No. 04-170

In the Supreme Court of the United States

MARIE HAHN,

Petitioner,

v.

THE VILLAS AT ST. THERESE ASSISTED LIVING, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

PETITIONER'S REPLY BRIEF

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I. ARGUMENT

A. O.R.C. 2505.02(a)(2) Is Unconstitutional and There Are Compelling Reasons for the United States Supreme Court to Grant the Petition for Writ of Certiorari

In their Brief In Opposition, at footnote 1, page 1, Respondents refer to recent amendments to O.R.C. 2505.02, which include changes made to subsections (B)(3) and (D), effective September 1, 2004. A careful reading of the amended version of O.R.C. 2505.02 proves that, contrary to Respondents' assertion, there was no amendment made to subsection (B)(3).

O.R.C. 2505.02(D), prior to the amendment, states:

"(D) This section applies to and governs any action, including an appeal, that is pending in any court on the effective date of this amendment and all claims filed or actions commenced on or after the effective date of this amendment, notwithstanding any provision of any prior statute or rule of law of this state."

O.R.C. 2505.02(D), after the amendment, states:

"(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state."

Other amendments to O.R.C. 2505.02, effective September 13, 2004, referred to by Respondents, include the addition of subsection (B)(6) which states:

"(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06,

> 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 3929.71, 4705.15, and 5111.018 [5111.01.8], and the enactment of sections 2305.113 [2305.11.3], 2323.41, 2323.43, 2323.55 of the Revised Code."

O.R.C. 2505.02 was amended a third time, effective September 13, 2004, with changes to subsection (A)(3).

O.R.C. 2505.02(A)(3), prior to the amendment, states:

"(A) As used in this section:

> (3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence."

O.R.C. 2505.02(A)(3), after the amendment, states:

"(A) As used in this section:

> (3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, or a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code."

Even though Respondents set forth these amendments as a pretext for this Court not to grant Petitioner's Petition For a Writ of Certiorari, it is obvious that none of these amendments correct the unconstitutionality of O.R.C. 2505.02(A)(2) which precludes appeal of a preliminary injunction in a common law action for trespass, which restrains First Amendment rights, which is in conflict with United States Supreme Court decisions, which state that the requirement imposed by the First Amendment is that a State provide procedures to "assure a prompt final judicial decision", Freedman v. Maryland, 380

U.S. 51, 59 (1965). Immediate appellate review is to be provided by the state or absent such review, a stay of the injunction must be allowed by the State. See National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977); M.I.C., Ltd. v. Bedford Township, 463 U.S. 1341 (1983), and Nebraska Press Assn. v. Stuart, 423 U.S. 1319 (1975).

In the Court of Appeals, Tenth Appellate District, Respondents argued, in their Motion To Dismiss Appellant Marie Hahn's Appeal filed on November 24, 2003, that O.R.C. 2505.02(A)(2) precludes appeal of the preliminary injunction. Two days later, on November 26, 2003, after the record had been transmitted to the Court of Appeals, the Court of Appeals dismissed the appeal "for lack of a final appealable order" evidently agreeing with Respondents' argument, even though O.R.C. 2305.02 was not cited by the Court of Appeals. In the Supreme Court of Ohio, Respondents also argued that O.R.C. 2505.02(A)(2) precluded appeal of the preliminary injunction.

In an attempt to circumvent their own argument to the appellate court and to the Supreme Court that O.R.C. 2505.02(A)(2) precludes appeal of the preliminary injunction which restrains Petitioner's constitutional right of freedom of association, Respondents now argue to this Court at page 13 of their brief in opposition that Petitioner never asserted O.R.C. 2505.02(B)(4). In their Motion To Dismiss, filed in the Court of Appeals on November 24, 2004, Respondents stated at footnote 2, page 8:

> "[2]The Villas would further point out that the trial court's Order of Preliminary Injunction does not comply with the requirements of R.C. 2505.02(4) as the order did not determine the action as to the injunctive relief, in that the order was clearly not a permanent injunction. . ."

Respondents claim that Petitioner should have asserted O.R.C. 2505.02(B)(4) when they themselves admit that it doesn't fit the instant case. Pursuant to the United States

Supreme Court decisions in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), and M.I.C., Ltd. v. Bedford Township, 463 U.S. 1341 (1983), which are the Supreme Law of the Land, appeal of a preliminary injunction which restrains First Amendment rights, does not have to fit within O.R.C. 2505.02 to justify immediate appeal of the injunction or a stay of the injunction pending appeal. Petitioner would note that O.R.C. 2505.02 does not preclude a stay of a preliminary injunction, an alternative to an immediate appeal, as set forth in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977). The Supreme Court of Ohio denied Petitioner's Motion For Stay of Preliminary Injunction on January 21, 2004. (A copy of the Ohio Supreme Court's Entry, denying Petitioner's Motion for Stay is attached to the Petition For Writ of Certiorari at Appendix B).

Pursuant to Maness v. Myers, 419 U.S. 449 (1975), the proper procedure is to appeal the invalid preliminary injunction. Petitioner has asserted and proved in the trial court, the Court of Appeals and Supreme Court of Ohio that the preliminary injunction is invalid and unlawful because Respondents had "unclean hands" when they obtained it and there are two citations issued by the Ohio Department of Health to prove Petitioner's claim. It is unconstitutional for a party to be forced to obey an invalid injunction for years without the due process of an opportunity to be heard and access to the courts to appeal as to why the injunction is invalid. (Amendment XIV).

Petitioner asserted in her Petition at pages 5 and 6 that the Supreme Court of Ohio "rulings pertaining to Constitutional questions are in conflict with relevant decisions of the Supreme Court of the United States in National Socialist Party of America v. Skokie, 432 U.S. 43 (1977) and M.I.C., Ltd. v. Bedford Township, 463 U.S. 1341 (1983)."

B. Petitioner's Petition for Writ of Certiorari Is Not Defective

On August 29, 2004, Petitioner served three copies of her Petition For Writ of Certiorari on the Attorney General of Ohio at the request of the United States Supreme Court. A copy of the Proof of Service to the Attorney General was sent to the Court, as well as to counsel for Respondents, on August 30, 2004. A copy of the certificate of mailing to counsel for Respondents is attached hereto as Appendix A. Even though the round stamp is smeared it is obvious that it was sent in August, therefore, Respondents had knowledge of the service to the Attorney General before they filed their brief in opposition on September 7, 2004 and before they filed a Supplemental Brief on September 9, 2004, which does not comply with Rule 15 of the Rules of the United States Supreme Court.

Petitioner asserts that she has complied with the request of the United States Supreme Court and that her Petition is not defective.

C. Petitioner's Petition for Writ of Certiorari Is Not Moot

The Petition for Writ of Certiorari is not moot because Respondents have not abandoned their trespass claim or withdrawn the preliminary injunction. In fact they are seeking a permanent injunction. Petitioner filed a Counterclaim asserting that the preliminary injunction violated her First Amendment right of freedom of association and her rights as a "sponsor" as defined in the Patient's Bill of Rights, O.R.C. 3721.13(B).

Petitioner has had to obey an unlawful order for almost a year. Respondents' claim at page 9 of their brief in opposition, that the trial court order of preliminary injunction enjoined Petitioner from having contact with Monsignor Faistl is false. (See Order of Preliminary Injunction attached to the Petition For Writ of Certiorari at Appendix E). The order states that Petitioner could not take any action to remove Monsignor Faistl

from The Villas, Monsignor Faistl and Petitioner should have been able to communicate at least by telephone, but due to Respondents' action they were unable to do so. Respondent changed Monsignor Faistl's telephone number to an unlisted number and did not give him the new number.

The order which precluded any contact between Monsignor Faistl and Petitioner was an order to Petitioner by the Bishop of Columbus who exceeded his authority and violated Petitioner's First Amendment rights and her rights as a "sponsor" and Monsignor Faistl's constitutional rights and state rights. As owner/landlord he infringed on his renter's right of freedom of association with whom he wished to associate. The Administrator/nuns of The Villas chose to obey the Bishop's order, a copy of which was issued to them, instead of the federal and state law which governs the state licensed facility. When Petitioner visited Monsignor Faistl on September 25, 2003, The Villas applied to the state court to enforce the Bishop's unlawful order and the state granted them an injunction to do so. The Bishop's order has been left out of Respondents' Background Facts, however, it is part of the record in this case, which is indicative of the lack of separation of Church and State. (The Bishop's order is attached to Petitioner's Motion To Dissolve Temporary Restraining Order filed in the trial court on October 1, 2003).

The Petition For Writ of Certiorari is also not moot because Petitioner had close relationship/associations with other residents of The Villas who assembled with her on a daily basis for the practice of religion. Petitioner has been prevented from associating with all of these people and many of them are now deceased.

One example of the irreparable harm caused to Petitioner's associations took place before Petitioner was even informed of the Bishop's order and ban. A resident of The Villas and friend of Petitioner in her eighty's called Petitioner to inform her that Sister John, one of three nuns in charge of The Villas, told her

that if she helped Petitioner in any way with the situation, that she would be banned by the Bishop from The Villas the same as Petitioner. The resident was afraid of losing her home so she withdrew from any contact with Petitioner.

Another prime example of the effect of the irreparable harm to Petitioner's associations at The Villas caused by the preliminary injunction is Petitioner's association with a priest, Father Joseph Jerabeck who lived in the apartment next to Monsignor Faistl. Father Jerabeck privately counseled Petitioner on personal matters in regard to The Villas. He could have verified that Respondents falsified the hours which Petitioner spent at The Villas because he knew of the visits which she made daily and the time which she actually spent there rather than the false times which Respondents have set forth in their brief in opposition. Father Jerabeck told Petitioner's husband, Michael Hahn, who called Father Jerabeck after the ban, that he was forbidden to have any further contact with Petitioner and her husband under threat of losing his residence. Father Jerabeck is now deceased; as are many other residents of The Villas who were knowledgeable of the facts and could prove that Petitioner caused no disruptions at The Villas, as the evidence from the Ohio Department of Health proves. (The Ohio Department of Health report is attached as Exhibit F to Petitioner's Application For Reconsideration and Motion For Stay of Preliminary Injunction filed with the Court of Appeals on December 8, 2003).

For the foregoing reasons, Petitioner asserts that her Petition For Writ of Certiorari is not moot. Petitioner also asserts that there is a reasonable expectation that she will be subject to similar action in the future because of her religious association with Monsignor Faistl. The Bishop could issue further unlawful orders to Petitioner and seek injunctions from the court to enforce the orders. See Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 223 (6th Cir. 1996):

". . . the Supreme Court has long recognized an exception to the mootness doctrine for wrongs 'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); see also Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 2796-97, 49 L.Ed.2d 683 (1976) . . ."

D. The Order of Preliminary Injunction Infringed upon Petitioner's First Amendment Right of Freedom of Association

Petitioner had a personal private religious association with Monsignor Faistl for 18 months at The Villas. When restrictions were placed on Petitioner's visitation with Monsignor Faistl by the Administrator of the Villas on August 7, 2003, Monsignor Faistl, himself, requested both orally and in a letter to the Administrator that the restrictions be lifted. These requests were ignored. Monsignor Faistl also wrote a letter to the Bishop of Columbus and placed a telephone call to him, asking for help in having the restrictions lifted, both of which were ignored. Monsignor Faistl's letters are attached as Exhibits E and F to Petitioner's Motion To Dissolve Temporary Restraining Order filed in the trial court on October 1, 2003.

Monsignor Faistl approved of Petitioner contacting the Officer of the Long-Term Care Ombudsman, Ohio Department of Aging, as he hoped that they would resolve the problem and have the restrictions lifted. Monsignor Faistl not only wanted to associate with Petitioner, but he wanted no restrictions on their association which was his right pursuant to O.R.C. 3721.13(A)(21). It is ridiculous for Respondents to insinuate that Petitioner was stalking Monsignor Faistl.

Monsignor Faistl continued to telephone Petitioner until he was no longer allowed to use his telephone.

Monsignor Faistl decided to leave The Villas on his own on August 30, 2003, but his transit company, Access, was told by The Villas that he was state ordered there and that they were his

guardian and that he could not leave. Monsignor Faistl requested that Attorney Don Chapin help him leave The Villas. A transcript of a recorded telephone conversation placed to Attorney Chapin by Monsignor Faistl, is part of the record in this case and is attached as Exhibit I to Petitioner's Motion To Dissolve Temporary Restraining Order filed in the trial court on October 1, 2003 and in Attorney Chapin's lawsuit against The Villas and the Diocese of Columbus. The transcript states in part:

"FIRST MESSAGE:

MF: This is Father Faistl. I want to talk to you about helping me move out of here. Please help me."

As Attorney Chapin stated in his verified complaint, (See Petition at page 10), Monsignor Faistl was intimidated and controlled, and isolated from Attorney Chapin, as well as from Petitioner and her husband. Monsignor Faistl signed affidavits when he was still at The Villas to clarify the affidavit to which The Villas obtained his signature under these conditions. Monsignor Faistl's affidavits are attached as Exhibits B and E to Petitioner's Application For Reconsideration and Motion For Stay of Preliminary Injunction filed in the Court of Appeals on December 8, 2003. Monsignor Faistl states in his affidavit, dated November 26, 2003: "I wish to have private unrestricted visits with Marie Hahn."

On September 25, 2003, after Monsignor Faistl opened the door for Petitioner, she spent approximately ten minutes visiting with him in his room with the door open. Petitioner assisted him in getting ready for bed and obviously she had no intention of removing him. The evidence proves that all of Respondents' accusations and insinuations pertaining to Petitioner's association with Monsignor Faistl are false.

The preliminary injunction granted to Respondents was ". . . so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment."

See Thompson v. City of Louisville, 362 U.S. 199, Syllabus 1960)).

The Bishop's order to Petitioner violated Petitioner's constitutional rights and the state court punished Petitioner with the issuance of an injunction. "One cannot be punished for failing to obey a command which violates the Constitution. . ." (See Wright v. Georgia, 373 U.S. 284, Syllabus (1963)).

Respondents' case law pertains to picketing and demonstration. Petitioner was visiting a resident in his room, as she had done for eighteen months. Monsignor Faistl and she assembled peacefully with the residents of The Villas for the practice of religion. Respondents presented no evidence to prove that this visitation of Monsignor Faistl with his "sponsor" caused any disruption, let alone material or substantial disruption.

CONCLUSION

Respondents cannot restrain the constitutional rights of residents or those who visit them. A state statute, (O.R.C. 2505.02(A)(2)), which precludes the appeal of a preliminary injunction which restrains First Amendment rights is unconstitutional and in conflict with United States Supreme Court decisions. The United States Supreme Court held in Frisby v. Schultz, 487 U.S. 474, 479 (1987):

> ". . . Because the question presented is of substantial importance, and because further proceedings below would not likely aid our consideration of it, we choose to avoid the finality issue simply by granting certiorari. . ."

For all of the foregoing reasons, Petitioner, Marie Hahn, respectfully requests that her Petition For Writ of Certiorari be granted.

Respectfully submitted,

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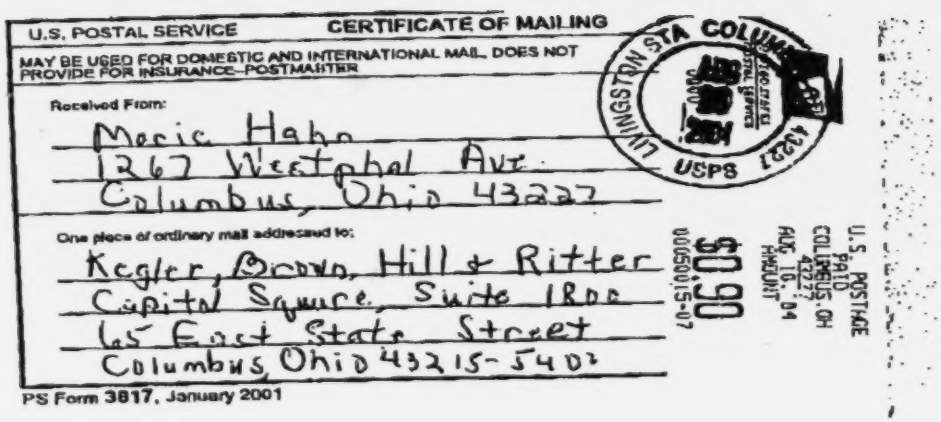

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